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No.03-111

In the Supreme Court of the United States

STATE OF TENNESSEE AND TENNESSEE DEPARTMENT OF ENVIRONMENT AND CONSERVATION

Petitioners,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION, RESEARCH AND SPECIAL PROGRAMS ADMINISTRATION AND ASSOCIATION OF WASTE HAZARDOUS MATERIALS TRANSPORTERS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT ASSOCIATION OF WASTE HAZARDOUS MATERIALS TRANSPORTERS

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QUESTION PRESENTED

Under 49 U.S.C. § 5125(d)(1), the Secretary of Transportation uses a notice-and-comment procedure to determine whether particular state laws are preempted by the express preemption provisions of the Hazardous Materials Transportation Act. Administrative determinations of preemption issued pursuant to this procedure are entitled to *Chevron* deference in subsequent judicial proceedings. The question presented is whether this administrative process for making preemption determinations is inconsistent with state sovereign immunity.

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STATEMENT

1. The Hazardous Materials Transportation Act, 49 U.S.C. § 5101 *et seq.* (the "HMTA" or "Act"), regulates the interstate transportation of hazardous substances. A central goal of the Act is to "preclude a multiplicity of State and local regulations and the potential for varying as well as conflicting regulations in the area of hazardous materials transportation." S. Rep. No. 93-1192, at 37 (1974). See also H.R. Rep. No. 101-444(I), at 21 (1990) (1990 amendments to the Act intended to ensure "a high degree of uniformity of Federal, State, and local laws * * * to promote safety and encourage the free flow of commerce").[1/]

In furtherance of this objective, the Act, as amended in 1990, expressly preempts any requirement of a state, local government, or Indian tribe that addresses the transportation of hazardous materials when

> (1) complying with [the] requirement of the State, political subdivision, or tribe and a requirement of this chapter or a regulation prescribed under this chapter is not possible; or
>
> (2) the requirement of the State, political subdivision, or tribe, as applied or enforced, is an obstacle to accomplishing and carrying out this chapter or a regulation prescribed under this chapter.

49 U.S.C. § 5125(a). The Act also expressly preempts any state, local, or tribal requirements relating to the transportation of hazardous materials and involving specified subject areas, when the non-federal requirements are not "substantively the

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[1/] The Act initially was codified at 49 U.S.C. § 1801 *et seq.* In a subsequent revision of Title 49, the provisions of the HMTA were made a part of the Title 49 Appendix. Congress again recodified the HMTA without substantive change in 1994 at 49 U.S.C. §§ 5101-5127.

same" as the federal rules concerning those subjects. 49 U.S.C. § 5125(b)(1).

In addition, the Act restricts the circumstances in which states, local governments, and Indian tribes may levy fees in connection with the transportation of hazardous materials. In its current form, the Act provides:

> A State, political subdivision of a State, or Indian tribe may impose a fee relating to transporting hazardous material only if the fee is fair and used for a purpose related to transporting hazardous material, including enforcement and planning, developing, and maintaining a capability for emergency response.

49 U.S.C. § 5125(g)(1).

2. Having set out the substantive scope of preemption under the HMTA, Congress also established a unique mechanism by which the Secretary of Transportation can determine whether the Act preempts particular state requirements. As modified by the 1990 amendments, the Act provides that any party directly affected by a state, local, or tribal hazardous materials requirement may apply to the Secretary for an administrative determination regarding "whether the requirement is preempted" (49 U.S.C. § 5125(d)); a state, local government, or Indian tribe may request such a determination regarding its *own* requirements. *Ibid.* The Secretary has delegated the authority to make most such preemption determinations to the Associate Administrator of Hazardous Materials Safety of the Department of Transportation's Research and Special Programs Administration. See 49 C.F.R. § 107.209(a).

Under regulations promulgated by the Secretary pursuant to the Act (see 49 U.S.C. § 5125(d)(2) (directing the Secretary to prescribe regulations governing determinations of preemption)), applicants for an administrative preemption determination must send a copy of their application to the affected state, local government, or Indian tribe. 49 C.F.R. §

107.205. The Associate Administrator must publish notice of the application in the Federal Register and offer interested parties an opportunity to comment. 49 U.S.C. § 5125(d)(1); 49 C.F.R. § 107.205(b). In determining how to resolve the application, the Associate Administrator "may initiate an investigation of any statement in [the] application," "may solicit and accept submissions from third persons relevant to an application," "may consider any other source of information," and "on his or her own initiative may convene a hearing or conference, if he or she considers that a hearing or conference will advance his or her evaluation of the application." 49 C.F.R. § 107.207(a). Once the Associate Administrator reaches a conclusion, the decision "constitutes an administrative determination as to whether a particular requirement of a State or political subdivision or Indian tribe is preempted under the Federal hazardous materials transportation law or regulations issued thereunder." 49 C.F.R. § 107.209(d). That determination is filed in the public docket and published in the Federal Register. 49 C.F.R. § 107.209(c).

The Associate Administrator's preemption determination is subject to review in United States district court. 49 C.F.R. § 107.213. Moreover, the Act and associated regulations explicitly indicate that they do not preclude either a state or any other affected party from forgoing the administrative process altogether and seeking "a decision on preemption from a court of competent jurisdiction." 49 U.S.C. § 5125(d); 49 C.F.R. § 107.203(d).

3. Tennessee law levies a flat annual fee, currently set at $650, on all persons who obtain a permit to transport hazardous waste in the State. Tenn. Code Ann. § 68-212-203(a)(6). Believing that the state fee is inconsistent with the Act, respondent Association of Waste Hazardous Materials Transporters ("AWHMT") filed an application with the Associate Administrator, seeking a determination that the fee

is preempted. See Pet. App. 7-8.[2/] A copy of the application was sent to Tennessee officials and printed in the Federal Register, and interested parties were invited to submit comments. See 63 Fed. Reg. 17479 (Apr. 9, 1998). In response, the Tennessee Department of Environment and Conservation, the Association of American Railroads, and the Hazardous Materials Advisory Council all provided comments to the Associate Administrator. After reviewing these materials, the Associate Administrator determined that the HMTA preempts the Tennessee fee, finding that the fee is not "fair" and is not used for purposes related to the transportation of hazardous waste. 64 Fed. Reg. 54474 (Oct. 6, 1999).

Tennessee then sought judicial review of the Associate Administrator's preemption determination in the Middle District of Tennessee. The magistrate judge to whom the case was referred recommended that the administrative determination be vacated, reasoning that the Act's procedure for making preemption determinations is inconsistent with principles of state sovereign immunity. Pet. App. 17-82. The district court rejected the magistrate's recommendation, however, concluding that "[n]either the Supreme Court nor any Circuit Court has ever extended state sovereign immunity to Federal executive administrative action." *Id.* at 21. The court referred the case back to the magistrate for resolution of the merits of the preemption argument.

The court of appeals affirmed. Pet. App. 1-16. Because this Court had decided *Federal Maritime Commission* v. *South Carolina State Ports Authority*, 535 U.S. 743 (2002), during the pendency of the appeal, the Sixth Circuit recognized that "the

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[2/] AWHMT also sought a determination of preemption regarding a second Tennessee requirement, which obligated transporters of hazardous materials to file written reports of any discharge of such materials in the State. See Pet. 5 n.2; Pet. App. 91. The State did not seek judicial review of the Associate Administrator's determination that this requirement is preempted.

district court's analysis in this case, which rejected Tennessee's claim of sovereign immunity merely on the basis that the USDOT proceeding was administrative in nature, is no longer complete." Pet. App. 11. Instead, the court of appeals reasoned that "the central question in this case" is "whether the process of preemption determination established by Congress and carried out by the USDOT falls within the ambit of adjudicatory determinations barred by state sovereign immunity, as delineated in *Federal Maritime Commission*." *Id.* at 10. The court answered that question in the negative, holding that "the process used by the USDOT simply is not an 'adjudication,' as that term was used by the majority in the Supreme Court decision." *Id.* at 12.

In reaching that conclusion, the court of appeals explained that, "[a]lthough unique in its structure, the procedure [established by the Act] fits within the informal rule-making process outlined in the Administrative Procedure Act." Pet. App. 12. State officials are not obligated to participate in the administrative process and "[e]ven if the state chooses not to participate, it is not barred from challenging the final determination in a federal district court." *Id.* at 13. Thus,

> [t]his process differs dramatically from the one scrutinized by the Supreme Court in *Federal Maritime Commission* and, quite plainly, does not mirror federal civil litigation. There are no formal rules of practice or procedure, no formal complaint is required, there is no provision for an answer by the state, and there is no formal discovery process. An investigation, if initiated by the Associate Administrator, is not governed by formal discovery rules. The Administrator is not required to conduct a hearing, and if a hearing is conducted, it is not bound by the rules of evidence or civil procedure, nor is it handled by an administrative law judge. * * * The resulting ruling is prospective only.

Ibid.

The court of appeals found two of these points to be of particular significance. First, the court noted that the Associate Administrator "acts not as an Article III judge, virtually or functionally, but merely, as the title implies, as an administrator of a federal agency interpreting and enforcing federal legislation in reaching the preemption determination." Pet. App. 14. Second, the court observed that the preemption determination "serves as an administrative interpretation of a federal statute, prospective only in its application and warranting *Chevron* deference in subsequent litigation. * * * The action of the Associate Administrator does not result in an order of enforcement against a state, nor does it leave a state defenseless in later litigation if the state chooses not to participate in the administrative proceeding." *Id.* at 15 (citing *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)). The court accordingly concluded that "[t]his procedure, employing a notice-and-comment process and the expertise of the USDOT, does not offend the dignity of the states, nor does it force a state to adjudicate claims brought by private citizens against the state as if it were sued in an Article III tribunal." *Id.* at 16. The court accordingly remanded the case for resolution of the substantive preemption issue.

REASONS FOR DENYING THE PETITION

The decision below is correct: the Act's mechanism for making preemption determinations plainly involves a form of administrative rulemaking, a process that never has been thought to implicate the sovereign immunity of states that are affected by agency rules. There is no conflict in the circuits – or, so far as we have been able to determine, *any* other reported decision – involving the issue presented here. And because the governing constitutional rule recently has been settled by this Court, petitioners' argument is confined to a narrow complaint about the application of that rule to a curious statutory structure that has no parallel elsewhere in the U.S. Code. In such circumstances, review by this Court is not warranted.

1. The principles that control in this case are undisputed. On the one hand, there is no doubt that federal agencies may take actions that affect states and that have the effect of displacing state law. See, *e.g.*, *Norfolk Southern Ry. Co.* v. *Shanklin*, 529 U.S. 344 (2000). In doing so, of course, agencies may (and frequently do) invite comment and participation in the administrative process by states and other interested parties. Nothing in that process runs afoul of state sovereign immunity. See *Federal Maritime Comm'n*, 535 U.S. at 764 n.16 ("[s]overeign immunity concerns are not implicated * * * when the Federal Government enacts a rule opposed by a State"); *id.* at 783 (Breyer, J., dissenting).

On the other hand, as the court below recognized, principles of sovereign immunity preclude a federal agency from requiring a state "to defend itself in an adversarial proceeding against a private party." *Federal Maritime Comm'n*, 535 U.S. at 760-761. These principles come into play when an agency process compels a state to participate as a defendant in adjudication – when, that is, the administrative "proceeding 'walks, talks, and squawks very much like a lawsuit.'" *Id.* at 757 (citation omitted).

The outcome in this case thus turns on where along this spectrum the HMTA's unique mechanism for making preemption determinations falls. And the Sixth Circuit assuredly was correct in finding that administrative preemption proceedings conducted under the Act do *not* walk, talk, or squawk like litigation. That point is made clear by the Court's analysis in *Federal Maritime Commission.*

2. In that case, the Court identified the considerations that made the administrative process there at issue impermissibly adjudicative in nature. As the Court explained, FMC proceedings "bear a remarkably strong resemblance to civil litigation in federal courts": an FMC case "is commenced by the filing of a complaint"; "[t]he defendant then must file an answer" and "may also file a motion to dismiss"; the defendant

may "file counterclaims against the plaintiff"; and "default judgment may be entered on behalf of the plaintiff." 535 U.S. at 757. Similarly, "discovery in FMC adjudications largely mirrors discovery in federal civil litigation": parties may conduct depositions, serve written interrogatories, request production of documents, and submit requests for admissions. *Id.* at 758. In addition, "the role of the [FMC] ALJ * * * is similar to that of an Article III judge." *Ibid.* And the plaintiff in such a proceeding may seek damages, as well as injunctive and other relief, from the defendant. See *id.* at 748-749. In this context, "the similarities between FMC proceedings and civil litigation are overwhelming." *Ibid.*

Here, in contrast, the Act's process for determining preemption differs in *every* particular from the FMC proceeding at issue in *Federal Maritime Commission* – and from the elements that characterize civil litigation. As the court of appeals explained, the Act does *not* provide for a complaint or answer; a "default judgment" is not possible; there is no discovery of any kind conducted by the parties; and the Associate Administrator does not act anything like an Article III judge when using notice-and-comment procedures to determine the scope of the Act's preemptive effect. See Pet. App. 13.

Moreover, the Court found it especially noteworthy in *Federal Maritime Commission* that states were "effectively * * * required to defend themselves against private parties in front of the FMC" (535 U.S. at 762) because states that failed to appear as defendants would "stand defenseless once enforcement of the Commission's * * * order or assessment of civil penalties is sought in federal district court." *Id.* at 763. But the HMTA imposes no such coercive pressure. The Associate Administrator does not enter judgment or any order "against" a state when making a preemption determination. And if a state chooses not to participate in the administrative process, "it is not barred from challenging the final [preemption] determination in a federal district court." Pet.

App. 13.[3/] It is difficult to see anything in this procedure that constitutes "an impermissible affront to a State's dignity." *Federal Maritime Comm'n*, 535 U.S. at 760.

3. The various arguments petitioners offer in support of their request for certiorari are insubstantial. Two points warrant special mention. *First*, citing the Act's legislative history, petitioners assert that they were forced to contest the administrative preemption determination because Congress made such determinations "binding on a State." Pet. 11; see also Pet. 20. But nothing in the HMTA or the administrative process makes the Associate Administrator's preemption determinations self-enforcing orders that are akin to judicial decrees (or to the determinations of the FMC at issue in *Federal Maritime Commission*). Instead, the reference in the legislative history of the Act's 1990 amendments to the creation of "a binding administrative process" as part of the mechanism for making preemption determinations (H.R. Rep. No. 101-444(I), *supra*, at 28) – in contrast to the Secretary's pre-1990 administrative process, which produced guidance on preemption that was "advisory in nature" (*id.* at 52) – indicated only that Congress envisioned a more formal procedure that would produce preemption determinations entitled to *Chevron* deference. Cf. *United States* v. *Mead Corp.*, 533 U.S. 218, 227

[3/] Although petitioners assert (at Pet. 24) that they somehow would have been precluded from advancing their arguments in court if they did not submit their views to the Associate Administrator, they cite nothing in support of that proposition, which is plainly wrong. To be sure, the Associate Administrator's preemption determination would be accorded *Chevron* deference in any subsequent judicial proceeding, just as would any agency finding issued after notice-and-comment rulemaking. But no one "den[ies] that a private citizen, in complaining to a federal agency, may seek a rulemaking proceeding, which may lead the agency (should the State fail to respond) to enact a new agency rule that the State opposes" (*Federal Maritime Comm'n*, 535 U.S. at 783 (Breyer, J., dissenting)) – a rule that likewise would be entitled to *Chevron* deference.

(2001) (an administrative determination that receives deference under *Chevron* "is binding on the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute").

Second, petitioners insist that the preemption determination process should be regarded as informal agency adjudication. Pet. 13-23. In fact, however, preemption determinations plainly are a species of agency *rule*. They fall within the Administrative Procedure Act's definition of a "rule," which encompasses "the whole or part of an agency statement *of general or particular applicability and future effect* designed to implement, *interpret*, or prescribe law or policy." 5 U.S.C. § 551(4) (emphasis added). They are issued after a process that is familiar in informal rulemaking: there is initial publication of the preemption application in the Federal Register, with interested parties invited to submit comments and other written materials. Compare 5 U.S.C. § 553(b), (c). The APA makes clear that a rulemaking process may be triggered by the application of a private party. See 5 U.S.C. § 553(e); see also *Federal Maritime Comm'n*, 535 U.S. at 761 n.12 (citation omitted) (rejecting analogy between a lawsuit and "'a federal administrative proceeding triggered by a private citizen'"). And the preemption determination itself – a prospective declaration about the scope of federal law that does not provide for a remedy directed to any private party and that is entitled to *Chevron* deference in future litigation – plainly "walks, talks, and squawks" like a rule.

4. For these reasons, the decision below is correct. But review would be inappropriate even if there were any lingering doubts on that score. The administrative process created by the Act appears to be unique: "the parties and the district court in this case were unable to identify any other congressional act employing a similar method" for making determinations of preemption. Pet. App. 12. And petitioner does not even allege a conflict in the circuits on the question presented here. As a consequence, the petition raises an issue of first impression

about the impact of a very recent decision of this Court on a most unusual statute. In such circumstances, the narrow question presented in the petition, which is concerned with the case-specific application of undisputed principles to a particular and exceptional statutory structure, does not warrant the Court's attention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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